IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971
No.___

DAVID STEPHEN BALL,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT
OF CERTIORARI
TO THE APPELLATE DEPARTMENT
OF THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA IN
AND FOR THE COUNTY OF ORANGE

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971
No.___

DAVID STEPHEN BALL,

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STATE OF CALIFORNIA

PETITION FOR WRIT
OF CERTIORARI
TO THE APPELLATE DEPARTMENT
OF THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA IN
AND FOR THE COUNTY OF ORANGE

Petitioner, David Stephen Ball, prays that a writ of certiorari issue to review the judgment of the Appellate Department of the Superior Court of the State of California in and for the County of Orange affirming the judgment of Municipal Court of the North Orange County Judicial District convicting petitioner of violation of California Penal Code Section 602 (j) (trespassing).

PROCEEDINGS BELOW

No written or oral opinions were rendered in this matter. The judgment of

conviction was made by Judge Dave Bach, Jr. of the Municipal Court of the North Orange County Judicial District, County of Orange, State of California, on February 18, 1971, without opinion, and was affirmed by the Appellate Department of the Superior Court of the State of California in and for the County of Orange on June 28, 1971, again without opinion. Appendix A. On July 12, 1971 the same Appellate Department denied petitioner's request for a rehearing or in the alternative for certification to the California Court of Appeal, Fourth Appellate District, but did stay the issuance of its remittitur for 30 days pending the filing of this Petition for Writ of Certiorari and thereafter until final determination. Appendix B. The proceedings below, reflected primarily in the Settled and Engrossed Statement on Appeal, are contained in the Clerk's Transcript.

JURISDICTION

The date of the judgment sought to be reviewed is June 28, 1971. This Court has jurisdiction under 28 U.S.C. § 1257(3). The Appellate Department of the Superior Court of the State of California in and for the County of Orange is the highest state court to which a misdemeanor appeal can be taken. California Constitution, Art. VI, § 11. Further appellate review can only be had by certification by the Appellate Department to the Court of Appeal, which was denied in the instant case. Rules 63 and 107 of California Rules of Court.

QUESTION PRESENTED

May the owner of Disneyland, a nationally known amusement center, completely

prohibit all first amendment activity on its parking lot surrounding the center, notwithstanding the fact that the public has unrestricted access to the lot?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution and California Penal Code section 602(j):

First Amendment:

> "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment:

> "Section 1.... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States..."

California Penal Code, section 602(j) provides as follows:

> "Every person who willfully commits a trespass by any of the following acts is guilty of a misdemeanor:
>
> . . .
>
> (j) Entering any lands, whether unenclosed or enclosed by fence, for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing,

or injuring any lawful business or occupation carried on by the owner of such land, his agent or by the person in lawful possession."

STATEMENT OF THE CASE

The facts of this case are set forth in the six page Settled and Engrossed Statement on Appeal, which was prepared by the trial judge for the Appellate Department of the Orange County Superior Court. It appears in the Clerk's Transcript. The proceedings were not reported.

In brief, petitioner, seeking signatures on an anti pollution initiative petition sponsored by the People's Lobby, telephoned Ron Domingues, Director of Operations at Disneyland on January 4, 1971, and asked for permission to obtain signatures on a petition at Disneyland. Domingues absolutely denied the request, stating that Disneyland denies all such requests.

On January 9, 1971 petitioner entered the Disneyland parking lot with his automobile upon paying the appropriate fee, and then parked it. He then proceeded to set up a card table adjacent to a ticket booth outside the Disneyland entrance (but on Disneyland property), and began soliciting signatures on the anti pollution petition.

Dennis Wulf, Operations Supervisor, informed petitioner several times that he was trespassing on private property and requested that he leave. Bob MacKinnon, Manager of Operations, also advised petitioner that he was trespassing on private property and requested that he leave. Finally, Officer

Terry M. Inns of the Anaheim Police Department informed petitioner that he was trespassing on private property (Disneyland parking lot). Petitioner, after telling the officer that he had a constitutional right to secure signatures on the premises, agreed to accept a citation and leave peacefully, in lieu of being arrested.

A trespassing complaint was then filed against the petitioner in municipal court, to which petitioner demurred, contending that under Amalgamated Food Employees vs. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) and Diamond vs. Bland, 3 Cal. 3d 653 (1970) cert. den. sub nom Homart Development Co. vs. Diamond, ___ U.S. ___ (1971) (petition for rehearing pending), he had the right under the first amendment to secure signatures on his petitions on the Disneyland parking lot. The municipal court rejected his argument and, after the prosecution put on its case, petitioner again made the same contention in a motion for acquital, which was denied. After the petitioner's case was presented, he again argued his conduct was protected by the first amendment. The trial court ruled against petitioner, found him guilty as charged, and sentenced him to ten days in jail.

Execution of the sentence was stayed pending appeal to the Appellate Department of the Orange County Superior Court, which, after considering the same arguments advanced in the trial court, affirmed the judgment without opinion.[1]

---

[1] At the trial Dennis Wulf, Operations

REASONS FOR GRANTING THE WRIT

A. The Judgment Below Violates Petitioner's Rights Under the First And Fourteenth Amendments.

This Court long ago dispelled the notion that mere private ownership of certain physical territory is a sufficient justification for the denial of the exercise of first amendment rights. In Marsh v. Alabama, 326 U.S. 501(1946), this Court held that a member of Jehovah's Witnesses could not be completely barred from distributing literature on the streets of a privately owned company town. There, as here, the state's trespass laws were used to stifle freedom of speech.

More recently, private shopping centers, because of their function, were

---

Supervisor, also testified that the path of a tram was diverted as a result of petitioner's activities. However, this allegation amounts to no more than the "obstruction" which is inherent in any physical presence. Cf. Diamond v. Bland, 3 Cal. 3d 653(1970), cert. den. sub nom Homart Development Co. v. Diamond, ___U.S. ___(1971)(petition for rehearing pending). It is clear that the alleged "obstruction" was not the basis for Disneyland's original refusal, for its demands that petitioner leave, for petitioner's citation by the police officer, for the conviction, nor for the affirmance by the appellate court.

denied the right to prohibit certain kinds of "speech" on the premises. Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308(1968).

The holdings of these cases reflect "the preferred position of freedom of speech" (Kovacs v. Cooper, 336 U.S. 77, 88 (1949)) and that "(F)reedom of thought, speech, and assembly ... are ... the most basic rights of all." (Thomas v. Collins, 323 U.S. 516, 543 (1945)).

Large commercial, business, recreation, and amusement centers, which attract thousands of persons daily, and which invite the public to their premises, such as shopping centers (Logan Valley, supra), bus terminals (Wolin v. Port of New York Authority, 392 F. 2d 83 (2nd Cir.), cert. den 393 U.S. 940(1968)) railroad stations (In re Hoffman, 67 Cal. 2d 845(1967)), and company towns (Marsh v. Alabama, supra.), have no legitimate interest in maintaining privacy, and therefore no compelling reason exists for the imposition of a complete ban on those members of the public who wish to contact other persons for the purpose of communicating with them or securing their signatures on petitions.

If petitioner, and others like him, are denied access to the public the first amendment's guarantee of free speech will be rendered meaningless except for those few persons wealthy enough to afford to communicate their messages by television, radio, or the press.

It is no answer to assert that petitioner could have gone door to door or

or utilized the public streets, for it was imperative that he have access to large numbers of persons during a short period of time. "One is not to have the liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Schneider v. State, 308 U.S. 147, 163(1939).

B. The Judgment Below Raises an Important Unresolved Constitutional Issue Which Should Be Determined by this Court.

This Court has never decided the issue which this case presents. In Marsh v. Alabama, supra, the Court held that a privately owned company town could not prohibit first amendment conduct on its streets and sidewalks. In Amalgamated Food Employees v. Logan Valley Plaza, supra, the Marsh holding was extended to shopping centers, only as to first amendment activities related to the purposes of the center (e.g. union picketing vis a vis an employer at the shopping center). The Court specifically left undecided the question as to whether a shopping center owner's "property rights, could, consistently with the First Amendment justify a bar on (communication). . . which was not thus directly related in its purpose to the use to which the shopping center property was being put." 391 U.S. at 320, fn. 9.

This Court, however, has been presented with the opportunity to resolve the issue in Homart Development Co. v. Diamond, OT 1970, No. 1469, cert. den. May 17, 1971, petition for rehearing pending, and it is

anticipated that the same issue will be brought to the Court's attention by way of a petition for writ of certiorari to review the decision of the Court of Appeals for the Ninth Circuit in Tanner v. Lloyd Corporation, Ltd., ___ F.2d ___ (9th Cir. July 7, 1971), which ruled that a shopping center owner could not prohibit certain peaceful first amendment activities on its premises.

A related issue involving a single store and labor union "first amendment conduct" is also pending before this Court in Central Hardware Company v. N.L.R.B., No. 1766, OT 1970.

Petitioner respectfully submits that this Court should use the instant case, as well as perhaps the others mentioned above, for resolving the issues left open in Marsh and Logan Valley.

C. The Judgment Below Resolves an Important Constitutional Issue Contrary to Applicable Decisions of This Court.

Although Marsh and Logan Valley do not deal precisely with the issue presented to this Court by the instant case, it is clear that the general principles developed by these cases are applicable and determinative. In brief, this Court has placed the first amendment above technicalities regarding "title," and has recognized the public function and nature of certain kinds of "private" property.

The property in question, a huge

parking lot surrounding Disneyland, which attracts thousands of visitors daily, should be considered in the same category as the streets, side walks and malls of Marsh and Logan Valley. No legitimate interest is endangered by permitting persons to communicate ideas on property such as huge parking lots which in part serve the same function as public streets, sidewalks, and malls. Cf. Hague v. CIO, 307 U.S. 496 (1939).

The judgment below is clearly inconsistent with the first amendment and the principles articulated by this Court numerous times in cases of this sort. The ten day jail sentence clearly has had a chilling effect on petitioner's willingness (and ability) to engage in additional first amendment activities, and it has had a similar effect on other "People's Lobby" volunteer anti pollution petition carriers. The judgment, if not reversed by this Court, will act as a prior restraint on similar worthwhile activities in the future.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

Roger Jon Diamond

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Attorney for Petitioner

APPENDIX A

APPELLATE DEPARTMENT
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	No. AP 1028
	)	
	)	ON APPEAL FROM
Plaintiff-Respondent,	)	THE MUNICIPAL
	)	COURT OF THE
vs.	)	NORTH ORANGE
	)	COUNTY JUDICIAL
DAVID STEPHEN BALL,	)	DISTRICT,
	)	HONORABLE DAVE
Defendant-Appellant.	)	BACH, JR., JUDGE
	)	

This cause having been argued and submitted, and fully considered, judgment is ordered as follows:

It is ordered and adjudged that the judgment of conviction made and entered in the municipal court of the above designated judicial district, County of Orange, State of California in the above entitled cause be, and the same is hereby, affirmed, and the cause remanded to the municipal court for further proceedings.

Dated this 28th day of June 1971

(s) Herlands
(s) William L. Murray
(s) Thompson

APPENDIX B

APPELLATE DEPARTMENT OF THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ORANGE

Court convened at 10:00 A.M., July 12, 1971, present Hon. Herlands, J; Hon. Murray, J; Hon. Thompson, Presiding, Judge; H.J.Gallagher Deputy Clerk; and the following proceedings were had:

AP 1028 PEOPLE VS BALL, David Stephen

Petition for rehearing or in alternative for Certification to the District Court of Appeal, having been received, the Court now rules: Petitions and each of them are hereby denied. Petition for stay of Issuance of Remittitur is granted for 30 days and thereafter until final determination of proceeding on Writ to United States Supreme Court or higher State Court are instituted. ENTERED 7-12-71.

CERTIFICATE OF SERVICE

I, Roger Jon Diamond, declare as follows:

I am an attorney at law duly admitted to practice before the Supreme Court of the United States, and I am the attorney for petitioner David Stephen Ball with respect to the accompanying Petition For Writ of Certiorari.

On August 9 1971, pursuant to Rule 33 of the Supreme Court Rules, I caused the within Petition For Writ of Certiorari to be served on Respondent State of California by placing three copies thereof enclosed in a sealed envelope with first class postage thereon fully prepaid, in the United States mail at Los Angeles California, addressed as follows:

Joseph B. Geisler, City Attorney
Robert O. Franks, Deputy
106 N. Claudina St., Suite 607
Anaheim, California 92805

Office of the Attorney General
Department of Justice
State of California
217 W. First Street
Los Angeles, California 90012

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 9 1971 at Los Angeles California.

Roger Jon Diamond

LIBRARY
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-209

DAVID STEPHEN BALL,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California in and for the County of Orange

BRIEF IN OPPOSITION TO PETITION

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BRIEF IN OPPOSITION TO PETITION

STATEMENT OF THE CASE.

Petitioner, after waiving a jury trail, was convicted of trespass in violation of California Penal Code Section 602(j) in a trial by the Court.

At the trial, the evidence showed that the Petitioner entered the premises of Disneyland, a privately owned commercial enterprise, on January 9, 1971, set up a table with signs and a can for donations in the area under the monorail track adjacent to Ticket Booth No. 5, and

began soliciting signatures for a petition. As a result of this activity by the Petitioner, an Operations Supervisor for Disneyland had to divert a tram that picks up people in the fence-enclosed parking area and takes them to the ticket booth area to another area in order to unload its passengers. The tram has three cars and is capable of carrying approximately one hundred fifty (150) people.

The evidence further showed that the Petitioner was told several times by various Disneyland officials that he would not be allowed to engage in this type of activity on Disneyland property and he was requested to leave. The Petitioner refused all these requests and was cited by an Anaheim Police Officer for violation of Section 602, subdivision (j) of the California Penal Code.

There was also evidence at the trial that Petitioner had called the Director of Operations at Disneyland several days before the date the citation was issued to request permission to obtain signatures on a petition at Disneyland. While denying Petitioner's request, the Director of Operations suggested that the Petitioner's activity could be carried on outside the Disneyland property.

The judgment of the Trial Court was affirmed by the Appellate Department of the Superior Court of the State of California in and for the County of Orange.

QUESTION PRESENTED

The Respondent disagrees with the "Question Presented" by the Petitioner in his brief (see Argument I, infra). Respondent contends that the Petitioner's statement of the "Question Presented" is inaccurate and is not the real issue in the instant case.

The question presented here is whether the Petitioner's actions of entering the premises and interfering with a lawful business in violation of a valid State criminal statute were constitutionally protected.

ARGUMENTS

I

The "Question Presented" by the Petitioner in This Case is Inaccurate.

The public does *not* have unrestricted access to the parking lot, which is part of the Disneyland complex, as stated by Petitioner on pages 2 and 3 of his brief. The evidence presented by the Respondent at the Trial Court, which is part of the Settled and Engrossed Statement on Appeal, was that the public is invited onto the enclosed parking lot only if they are going into the entertainment area.

There was further evidence at the trial, also included in the Settled and Engrossed Statement on Appeal, that Disneyland is completely enclosed by a fence, including the parking area, that Disneyland patrons must pay to park their cars on the parking lot, and that each entrance to the parking lot, including the entrance for walking patrons, is posted with "No Trespassing" signs in clear view.

In a shopping center situation the public is invited to enter, to shop, or to just stroll if they desire; however, such entry is *not* conditioned upon any purchase. On the other hand, at Disneyland a purchase, i.e. payment to be admitted to the park area, is required as a condition of entry. Disneyland extends an invitation only to those

members of the public who desire to pay the price of admission, to view and lawfully participate in the entertainment facilities.

The fact that various terms are employed to describe the enterprise does not broaden either the nature of the invitation or the use to which the premises are put.

II

The Judgment Below Does Not Violate Petitioner's Constitutionally Protected Rights Under the First and Fourteenth Amendments.

The Petitioner's contention that his constitutional guarantees under the First and Fourteenth Amendments were denied and that the State's trespass law was used to stifle freedom of speech have no merit according to decided cases nor as a philosophical appeal. What Petitioner is attempting to do, in effect, is to cloak himself with immunity under the First and Fourteenth Amendments from the legal consequences for acts committed in violation of a valid criminal statute.

This Court has previously pointed out that the fundamental rights of the Bill of Rights are not absolute (*Kovacs v. Cooper*, 336 U.S. 77, *Beauharnais v. People of State of Illinois*, 343 U.S. 250). In *Breard v. Alexandria*, 341 U.S. 622, the Court states:

> "The First and Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved."

Respondent respectfully submits that the constitutional rights guaranteed by the First and Fourteenth Amendments are limited by the constitutional rights of others to acquire and possess property, an instance of which is the right to carry on a business in a lawful way. By entering and interfering with a lawful business of a privately-owned commercial enterprise under the guise of exercising his constitutional rights, Petitioner, in addition to violating a valid State criminal statute, was submerging the rights of another. Owners of property also have constitutional rights.

The essence of the opinions of the cases cited by Petitioner is that the exercise of First Amendment rights cannot be prohibited in shopping centers, company towns, bus terminals, railroad stations, public streets and places historically associated with the exercise of First Amendment rights. The Respondent contends that Disneyland does not fit the rubric of any of these cases. Disneyland premises cannot be construed as analogous to any of the areas mentioned in the cases cited.

In *Marsh v. Alabama*, 326 U.S. 501, the company town was found to have the attributes of a state-created municipality "freely accessible and open to the people in the area and those passing through", while in *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308, the shopping center was said to serve as the community business block or as mentioned in the *Diamond v. Bland* case, 3C. 3d 653, "Indeed, in many instances the contemporary shopping center serves as the analogue of the traditional town square."

The premises of Disneyland serve neither as a business district for the surrounding residential communities nor as the "analogue of the traditional town square." In *Amalgamated Food Employees v. Logan Valley Plaza*, supra, at page 614, it was stated ". . . it is clear that the public has virtually unrestricted access to the property at issue here." This is not true in the instant case. Because of the nature of the particular use and the extent of the invitation involved, the premises in the instant case do not have the attributes akin to those of the property in the *Marsh*, *Logan Valley*, or other cases cited by Petitioner.

The State Appellate Court considered the cases cited by Petitioner in rendering its decision to affirm the judgment of the trial court. This Court has previously held that a criminal prosecution approved by the State should not be set aside as violative of due process without clear proof that such drastic action is required to protect constitutional rights (*Gallegos v. State of Nebraska*, 72 S. Ct. 141). Respondent contends that the petition should be denied because there has been no showing by Petitioner that his constitutional rights have been denied.

III

The Probative Force or Weight and Sufficiency of the Evidence Is Not Ordinarily Reviewable on Certiorari.

Petitioner argues in his "Statement of the Case" on pages 5 and 6, footnote 1, that Petitioner's obstruction was not the basis for the conviction or the affirmance by the Appellate Court. It appears that Petitioner is asking this Honorable Court to review the weight and sufficiency

of the evidence. In *Norton Company v. Department of Revenue of the State of Illinois,* 340 U.S. 534, this Court stated:

> "Of course, in constitutional cases, we have power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, but that does not mean that we will re-examine, as a court of first instance, findings of fact supported by substantial evidence."

This Court has always accorded great respect to the conclusions of the State Judiciary *(Akins v. State of Texas,* 325 U.S. 398). The Petitioner had ample opportunity to confront and cross-examine the witnesses against him at the trial level. Based on all the evidence, the Trial Court found the Petitioner guilty beyond a reasonable doubt. After submission of briefs and oral argument, the Appellate Department of the Superior Court of the State of California for the County of Orange affirmed that judgment.

IV

The Judgment Below Is Not Contrary to Applicable Decisions of This Court.

The Petitioner contends that "this Court has placed the First Amendment above technicalities regarding 'title'." The fallacy of Petitioner's view is that it implies that First Amendment rights are absolute and that all activities and conduct are sanctioned no matter what form they take or where they take place as long as they are done under the cover of the First Amendment. Re-

spondent submits that the privileges guaranteed by the First Amendment do not confer on one individual the right to use the privileges to the injury of another.

The parking area of Disneyland is an integral part of the entire complex and in no way does it resemble the streets, sidewalks, and malls of *Marsh* and *Logan Valley*.

Most of the same cases cited by Petitioner here were cited in the Court below. These cases were carefully considered and followed in rendering the judgment. The decision below turns upon its own facts. There is no conflict of decisions.

Conclusion.

Petitioner was convicted of trespass, a misdemeanor, after a sober, careful and eminently fair trial on the basis of evidence clearly establishing his guilt beyond a reasonable doubt. After submission of the briefs and oral arguments, the conviction was affirmed by the Appellate Department of the California Superior Court. The decision does not require further review.

The Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Alan R. Watts

Assistant City Attorney

106 North Claudina Street
Suite 607
Anaheim, California 92805

Attorney For Respondent

CERTIFICATE OF SERVICE

I, ALAN R. WATTS, declare as follows:

I am an Attorney at Law duly admitted to practice before the Supreme Court of the United States, and I am the Attorney for Respondent, People of the State of California, with respect to the accompanying Brief in Opposition to the Petition for Writ of Certiorari.

On October , 1971, pursuant to Rule 33 of the Supreme Court Rules, I caused the within Brief in Opposition to the Petition for Writ of Certiorari to be served on Petitioner, David Stephen Ball, through his attorney of record by placing three copies thereof enclosed in a sealed envelope with first-class postage thereon fully prepaid, in the United States Mail at Anaheim, California, addressed as follows:

Roger Jon Diamond
Attorney at Law
15415 Sunset Boulevard
Pacific Palisades, California 90272

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October , 1971, at Anaheim, California.

Alan R. Watts